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No. 84-2028

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILLIS SARGENT, WARDEN CUMMINS UNIT,
ARKANSAS DEPARTMENT OF CORRECTION,
Petitioner,

v.

BILLY JUNIOR WOODARD,
Respondent.

On Petition for Writ of Certiorari to The United States Court of Appeals for The Eighth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Although Petitioner's statement of the case is accurate, Woodard's case should not be reviewed by this Court. The Eighth Circuit, in *Woodard v. Sargent*, 753 F.2d 694 (8th Cir. 1985), held that: (1) Mr. Woodard was not procedurally barred from challenging the death-qualification of the jury in the guilt phase of his trial; (2) that the principle announced by the Eighth Circuit in *Mabry v. Grigsby*, 758 F.2d 226 (8th

Cir. 1985), *petition for cert. filed sub nom. Lockhart v. McCree*, 53 U.S.L.W. 3870 (U.S. May 29, 1985) (No. 84-1865) prohibited death-qualification of juries during the guilt phase of capital cases; and (3) Mr. Woodard, like the petitioners in *Grigsby*, was entitled to the benefit of the rule announced in that case. Accordingly, Mr. Woodard's death penalty and conviction were vacated.

I
REASONS FOR DENYING THE WRIT

Petitioner urges upon the Court three questions:

1. Whether the Eighth Circuit erred in finding that no procedural default barred its consideration of Woodard's sixth and fourteenth amendment claims;

2. Whether the Eighth Circuit erred in finding that the death-qualification of Woodard's jury violated the sixth amendment requirement of a fair cross section of the community and that such juries are conviction-prone; and

3. Whether the Eighth Circuit erred in applying *Mabry v. Grigsby* retroactively to Woodard's case.

For the reasons set forth more particularly in the paragraphs which follow, none of the questions is appropriate for review by this Court.

A. This Court Should Deny Certiorari on the Issue of Procedural Default

The Eighth Circuit held that Woodard's death-qualified jury claim was not barred from consideration in the federal courts by virtue of a procedural default under State procedural rules. *Woodard v. Sargent*, 753 F.2d at 699-705. Petitioner argues that this holding conflicts with decisions of

the Arkansas Supreme Court and that this Court should therefore grant certiorari. Petition at 5-8.

Petitioner's argument betrays a misunderstanding of the nature of decisions by the Arkansas Supreme Court. The Arkansas Supreme Court has never held that a claim of any sort was barred from consideration in the federal courts by virtue of a procedural default under State procedural rules, nor could it have any occasion to do so. Questions of federal court jurisidiction are not properly presented to or decided in the state courts. There could be no conflict between the decisions of the Arkansas Supreme Court and those of the Eighth Circuit on the issue of federal court jurisdiction.

The Eighth Circuit's decision on the issue of procedural default is in accord with the rule that the federal courts are not barred from reviewing issues decided by the state courts on their merits. *Caldwell v. Mississippi*, 105 S. Ct. 2633 (1985); *Wainwright v. Witt*, 105 S. Ct. 844, 856 n.11 (1985); *Ulster County Court v. Allen*, 442 U.S. 140 (1979). "The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case." *Caldwell v. Mississippi*, 105 S. Ct. at 2638. In this case, the Eighth Circuit held that the decision of the Arkansas Supreme Court on the death-qualified jury issue was a decision on the merits, and therefore open to review by the federal courts on petition for a writ of *habeas corpus*.

Petitioner labels as "egregious" and "utterly amazing" the Eighth Circuit's determination that the Arkansas Supreme Court decided Woodard's death-qualified jury claim on its merits. There is, however, nothing unusual about the Eighth Circuit's decision. The Arkansas Supreme Court rejected Woodard's death-qualified jury claim without men-

tioning procedural default, despite the fact that other issues were expressly dismissed on procedural grounds. *Woodard v. State*, 273 Ark. 235, 617 S.W. 2d 861, 862-63, *cert. denied*, 454 U.S. 1068 (1981). In such a situation, a federal court is not compelled to assume that a claim was rejected on procedural grounds; indeed the contrary presumption may be appropriate. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). Examination of other decisions of the Arkansas Supreme Court is an appropriate method of determining that court's intentions in the case at bar. *See, e.g., Caldwell v. Mississippi*, 105 S. Ct. at 2638-39.

In Woodard's case, the Eighth Circuit reasonably decided that a decision of the Arkansas Supreme Court was on the merits. The Eighth Circuit then applied the holding of this Court in *Ulster County Court v. Allen*, recently reaffirmed in *Caldwell v. Mississippi*, that a state court decision on the merits is open to review by a federal court on *habeas*. No issue worthy of certiorari is presented.

B. The *Grigsby* Issue Does Not Compel Review of Mr. Woodard's Case

Petitioner argues that since *Woodard* is controlled by the *Grigsby* decision, this Court should grant its petition and consolidate the two cases or hold *Woodard* in abeyance. Petition at 9. Although the *Grigsby* issue is controlling, the petition for writ of certiorari in that case should be denied. Alternatively, the petition in this case should be held in abeyance, pending disposition of the *Grigsby* issue in *Lockhart v. McCree*.

1. This Court Should Deny Certiorari In Both *Woodard* And *McCree*

The United States Court of Appeals for the Eighth Circuit's decision in *Woodard v. Sargent*, 753 F.2d 694 (8th Cir. 1985) is a straightforward application of its earlier decision

in *Mabry v. Grigsby*, 758 F.2d 226 (8th Cir. 1985), *petition for cert. filed sub nom. Lockhart v. McCree*, 53 U.S.L.W. 3870 (U.S. May 29, 1985) (No. 84-1865). The State of Arkansas' petition for writ of certiorari in *Lockhart v. McCree* should be denied for two reasons: (1) the Eighth Circuit's decision in *Grigsby* was correct; and (2) the apparent conflict between the circuits does not require resolution by this Court. Since the State's petition in *McCree* should be denied, so should the State's petition in this case be denied.

First, the Eighth Circuit in *Grigsby* accepted this Court's invitation in *Witherspoon v. Illinois*, 391 U.S. 510 (1968) to analyze the *Witherspoon* process of death-qualification of juries in a bifurcated death penalty proceeding. *Grigsby* represents not a deviation from announced principles of law, but rather the logical and correct resolution of an issue left open by this Court in *Witherspoon*—whether death-qualified juries are unconstitutionally conviction-prone.

Second, the apparent conflict between the decisions of the Fourth, Fifth and Eleventh Circuits, and the Eighth Circuit's decision in *Grigsby*, is not ripe for resolution by this Court. In *Witherspoon v. Illinois*, 391 U.S. 510, 518 (1968) this Court said that a sufficient presentation of evidence might well lead to the conclusion that "death-qualified" juries are impermissible in the guilt phase of a bifurcated proceeding. However, in each of the cases relied upon by Petitioner to suggest a conflict between the circuits, either no evidentiary hearing was held or evidence before the court was not considered in its decision.[1] Thus, only the Eighth Circuit has reached a conclusion in accordance with

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[1]Although considerable "evidence" was before the Fourth Circuit in *Keeten v. Garrison*, 742 F.2d 129 (4th Cir. 1984), *petition for cert. filed*, ____ U.S.L.W. ____ (U.S. Feb. 2, 1985) (No. 84-6187) it was not considered by the court in its decision.

this Court's guidelines in *Witherspoon*—i.e., after an evidentiary hearing. Denial of an evidentiary hearing on the issue of the guilt prone disposition of death-qualified jury, or ignoring the evidence adduced, is clearly contrary to this Court's mandate in *Witherspoon*. Until another circuit reaches a decision contrary to the Eighth Circuit's decision in *Grigsby* after an evidentiary hearing, no real conflict between the circuits exist on the ultimate question. Because *Grigsby* is the first decision predicated upon evidence adduced at an evidentiary hearing, it is not in conflict with other circuits, except on the issue of entitlement to and relevance of an evidentiary hearing. That issue is not presented by Petitioner. Accordingly, the petition should be denied.

2. If A Writ Of Certiorari Issues In *McCree*, This Court Should Take No Action With Respect To The Petition in *Woodard*

Even if the Court issues a writ of certiorari to the Eighth Circuit in the case of *Lockhart v. McCree*, it need not grant certiorari in *Woodard*. This Court's decision in *McCree* will be dispositive of the "death-qualification" issue in *Woodard*.[2] Issuance of a writ of certiorari in Mr. Woodard's case, and consolidation of that case with *McCree*, would not aid this Court's resolution of the issue. Specifically, even if this Court decides to consider the *Grigsby* issue, Mr. Woodard's case presents no additional significant issues. Accordingly, if this Court decides to review the Eighth Circuit's decision in *Grigsby*, it should as Petitioner requests, Petition at 9, hold the petition in this case in abeyance pending a decision in *Lockhart v. McCree*.

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[2]This Court cannot finally dispose of Woodard's petition for a writ of habeas corpus, even if *Grigsby* is reversed, since several issues pertaining to both phases of the bifurcated proceeding were not reached by the Eighth Circuit in Mr. Woodard's case.

C. This Court Should Deny Certiorari on the Issue of Retroactive Application of *Grigsby*

Petitioner also argues that the Eighth Circuit improperly interpreted the decisions of this Court in "retroactively" applying the decision in *Grigsby* to this case. Petition at 10-11. Petitioner's argument is without merit because: (1) no issue worthy of certiorari is presented; (2) if the defendants in *Grigsby* benefit by the *Grigsby* rule, it must also apply to Woodard; and (3) the Eighth Circuit properly applied the law as announced by the decisions of this Court in holding that *Grigsby* should be applied retroactively.

1. The Eighth Circuit's Retroactive Application of *Grigsby* to *Woodard* Presents No Significant Issues To This Court

This case presents to the Court no unique issues with respect to retroactivity. Retroactivity has been discussed by this Court on numerous occassions in accord with the Eighth Circuit's decision in *Woodard*. *See, e.g., Brown v. Louisiana*, 447 U.S. 323 (1980); *Hankerson v. North Carolina*, 432 U.S. 233 (1977); *Witherspoon v. Illinois*, 391 U.S. 510 (1968). *Woodard* presents no deviation from the principles applied by this Court on numerous occasions.

Further, there is currently no conflict among the circuit courts on the issue of retroactive application of the *Grigsby* principle. Until there is a conflict among the circuits, or some other compelling reason, there is no need for this Court to decide the issue. This Court has often announced constitutional principles in the area of criminal procedure without addressing the issue of retroactivity. *See, e.g., Payton v. New York*, 445 U.S. 573 (1980); *Edwards v. Arizona*, 451 U.S. 477 (1981). Consideration of the merits of retroactively applying the rule announced in *Grigsby* to other cases would be premature.

2. If the *Grigsby* Defendants Benefit by the Rule Announced in *Grigsby*, that Rule Must Also Apply to Mr. Woodard

Although the Court of Appeals correctly applied the principle announced in *Grigsby* to Mr. Woodard, the court's detailed discussion on the issue of retroactivity was unnecessary to the disposition of Mr. Woodard's case. The *Grigsby* court implicitly decided the retroactivity issue when it granted new trials to the *habeas* petitioners therein. If the *Grigsby* defendants receive the benefit of the *Grigsby* rule, Mr. Woodard, too, must be granted a new trial. *See Shea v. Louisiana*, 105 S. Ct. 1065, 1071 (1985). ("If the *Edwards* principle is not to be applied retroactively, the only way to dispense equal justice to Edwards and to Shea would be a rule that confined the *Edwards* principle to prospective application unavailable even to Edwards himself.") Both Mr. Woodard's case and *Grigsby* were considered by the Eighth Circuit at the same time. Basic considerations of equity militate strongly against granting the defendants in *Grigsby* the benefits of the new rule, while denying relief to Mr. Woodard, who raised the same issues in similar circumstances. In *United States v. Johnson*, this Court noted that it:

> has no power to speed up or slow down the appellate process in the many tribunals throughout the country to ensure similar treatment of similarly situated defendants. The Court does, however, have the power to eliminate the obvious unfairness that results when it gives only the most conveniently situated defendant the retrospective benefit of a newly declared rule.

457 U.S. 537, 557 n.17 (1982). *See, Williams v. United States*, 401 U.S. 646, 658 (1971); *Desist v. United States*, 394 U.S. 244, 258-59 (1969) (Harlan, J., dissenting). The *Grigsby* and *Woodard* appeals rose through the judicial system si-

multaneously. The Eighth Circuit implicitly applied the constitutional principle announced in *Grigsby* retroactively to the defendants in that case by giving them the benefit of the rule. Mr. Woodward, therefore, should be accorded the same treatment.

3. The Eighth Circuit Correctly Held That, Under Decisions of This Court, The Rule Announced in *Grigsby* Should Be Applied Retroactively

This Court has consistently held that consitutional principles designed to enhance the accuracy of criminal trials should be given retroactive effect. *See, e.g., Solem v. Stumes*, 104 S. Ct. 1338, 1342 (1984); *Williams v. United States*, 401 U.S. 646, 653 (1971). "When an assessment of . . . probabilities indicates that the condemned practice casts doubt upon the reliability of the determinations of guilt in past criminal cases, . . . the new procedural rule [must] be applied retroactively." *Brown v. Louisiana*, 447 U.S. at 329 (holding retroactive the rule that the sixth and fourteenth amendments are violated if an accused is convicted of a non-petty criminal offense by a non-unanimous six-person jury). Nowhere is this principle more important than in death penalty cases. *See Beck v. Alabama*, 447 U.S. 625, 637 (1980) (risk of prejudice which may be acceptable in a noncapital case "cannot be tolerated in a case in which the defendant's life is at stake").

In this capital case, the argument for retroactive application of the principle announced in *Grigsby* is compelling. The issue in *Woodard* and *Grigsby* — whether death-qualified juries are impartial on the issue of guilt or innocence — "goes to the heart of the truth-finding function of a trial by jury." *Woodard v. Sargent*, 753 F.2d at 696. In contrast, those principles that this Court has declined to apply retroactively to cases pending on habeas involve fourth and fifth amendment principles designed to protect privacy interests

and to mold future police behavior. *See, e.g., Solem v. Stumes*, 104 S. Ct. 1338 (1984); *United States v. Johnson*, 457 U.S. 537 (1982); *Williams v. United States*, 401 U.S. 646 (1971). Because *Grigsby* presents a constitutional doctrine affecting the integrity of the truth-finding function of the criminal trial, it must be given retroactive effect. *See, e.g., Williams v. United States*, 401 U.S. at 653; *Hankerson v. North Carolina*, 432 U.S. at 243.

This Court has held that decisions on retroactivity must consider "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall v. Denno*, 388 U.S. 293, 297 (1967); *Johnson v. State of New Jersey*, 384 U.S. 719, 727 (1966). The purpose of the new rule is the controlling factor. *See Desist v. United States*, 394 U.S. at 249.

Contrary to Petitioner's argument, countervailing considerations do not outweigh the importance of retroactively applying the rule announced in *Grigsby*. Petitioner argues that retroactive application will greatly disturb the administration of justice by opening the jail house doors. Petition at 11. However, procedural safeguards will keep the number of cases the rule could effect at a manageable level. The application of the doctrine of *Wainwright v. Sykes*, 433 U.S. 72 (1977), of necessity, will greatly limit the impact of the *Grigsby* decision. Only in those cases in which state courts decided the death-qualified jury issue on the merits, or in those in which "cause" and "prejudice" can be shown for a failure to raise the issue, will new trials be required. Petitioner offers neither argument nor evidence to suggest that a substantial number of cases would in fact be affected by retroactive application of this rule.

The *Grigsby* principle, furthermore, does not announce a completely new rule warranting only prospective effect. *See U.S. v. Johnson*, 457 U.S. at 549. *Witherspoon* clearly foreshadowed the outcome of *Grigsby*. *Witherspoon v. Illinois*, 391 U.S. at 521-23. The Eighth Circuit logically extended the *Witherspoon* principle to hold that a death-qualified jury is not impartial on the issue of guilt or innocence. This Court in *Witherspoon v. Illinois*, held that

> the jury-selection standards employed [at Witherspoon's trial] necessarily undermined the 'very integrity of the . . . process' that decided the petitioner's fate, and we have concluded that neither the reliance of law enforcement officials, nor the impact of a retroactive holding on the administration of justice warrants a decision against the fully retroactive application of the holding we announce today.

391 U.S. at 523-24 n.22 (citations omitted).

This Court has held that "complete retroactive effect is most appopriate where a new constitutional principle is designed to enhance the accuracy of criminal trials." *Solem v. Stumes*, 104 S. Ct. at 1342. The *Grigsby* doctrine reaches to the fundamental fairness of a trial by jury. The *Grigsby* principle, as noted by the court below, raises serious questions about the reliability of verdicts rendered by juries composed of men and women inclined to convict. *Woodard* 753 F.2d at 696. Thus, this is the paradigm case for retroactive application. The petition for writ of certiorari on this issue should be denied.

II
CONCLUSION

For the foregoing reasons, the Eighth Circuit's decision in *Woodard v. Sargent*, 753 F.2d 694 (8th Cir. 1985) is not appropriate for review by this Court. Mr. Woodard respectfully submits that the petition for writ of certiorari be denied.

Dated: August 30, 1985

Respectfully submitted,

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